TABLE OF CONTENTS OF PETITION.

	Page
I. Statement of the Matter Involved	2
II. Statement of the Basis of Jurisdiction	3
III. Questions Presented	4
IV. Reasons for Allowance of the Writ.....	5
V. Prayer for Writ of Certiorari	5
Certification	6
Appendix—Memorandum in Re Proceedings	23
—Bill of Lading	27

TABLE OF CASES CITED IN PETITION.

	Page
Commercial Molasses Corp. v. New York T. B. Corp., (1941) U. S. , 62 S. Ct. 156, 86 L. ed. Adv. Ops. 125	5
Luckenbach v. McCahan Sugar Co. (1918), 248 U. S. 139, 39 S. Ct. 53, 63 L. ed. 170	5
Panama Mail Steamship Company v. Vargas (1930), 281 U. S. 670, 50 S. Ct. 448, 74 L. ed. 1105	5
The Point Chico (1941), 122 F. (2d) 1	5
Scarborough v. Bartholomew et al. (1940), 22 N. Y. S. 2d 635	5

STATUTES CITED IN PETITION.

	Page
Harter Act (February 13, 1893, c. 105, §§ 1-8, 27 Stat. 445, 46 U. S. C. §§ 190-195)	2
§ 24 of the Judicial Code:	
R. S. § 563, Pars. 8, 9, § 629, Par. 6, March 3, 1911, c. 231	4
§ 24, Par. 3, 36 Stat. 1091, October 6, 1917, c. 97, § 1, 40 Stat. 395	4
June 10, 1922, c. 216, § 1, 42 Stat. 634, 28 U. S. C. § 41 (3)	4
§ 240 (a) of the Judicial Code:	
March 3, 1911, c. 231, § 240, 36 Stat. 1157	3
February 13, 1925, c. 229, § 1, 43 Stat. 938	3
January 31, 1928, c. 14, § 1, 45 Stat. 54	3
June 7, 1934, c. 426, 48 Stat. 926, 28 U. S. C. § 347.	3

TABLE OF CONTENTS OF BRIEF.

	Page
I. Opinions of the Courts Below	7
II. Jurisdiction of the Court	7
III. Statement of the Case	7
IV. Specifications of Error	7
V. Argument	8
(a) Certiorari Should Be Granted in Order to Reverse the Decision of the Circuit Court of Appeals for the Third Circuit and Resolve the Conflict Between That Decision and the Decision of the Circuit Court of Appeals for the Fifth Circuit	8
(b) Certiorari Should Be Granted to Reverse the Decision of the Circuit Court of Appeals in Order to Correct That Court's Departure From the Accepted and Usual Course of Judicial Proceedings	11
(c) Certiorari Should Be Granted in Order That This Court May Settle the Important Question Whether an Insurer Who Makes Payment Under a Loan Receipt or the Assured Is the Real Party in Interest	17
(d) Certiorari Should Be Granted in Order to Reverse the Decision of the Circuit Court of Appeals for the Third Circuit and Resolve the Conflict Between That Decision and the Decision of This Court	20
VI. Conclusion	22

TABLE OF CASES CITED IN BRIEF.

Page

Commercial Molasses Corp. v. New York T. B. Corp., (1941) U. S. , 62 S. Ct. 156, 86 L. ed. Adv. Ops. 125 21

Eastern Tar Products Corporation et al. v. Chesapeake Oil Transport Co. et al. (C. C. A. 4th, 1939), 101 F. (2d) 30 9

The C. R. Sheffer (C. C. A. 2nd, 1918), 249 Fed. 600, 601 .....19, 21

The Doyle (C. C. A. 3rd, 1939), 105 F. (2d) 113, 114 .. 19

The Fri, (C. C. A., 2nd, 1907); 154 Fed. 333..... 20

The G. R. Crowe (C. C. A., 2nd, 1923), 294 Fed. 506.. 21

The Heranger (C. C. A. 9th, 1939), 101 F. (2d) 953 ... 9

Interstate Circuit v. United States (1938), 304 U. S. 55, 58 S. Ct. 768, 82 L. ed. 1146 13

Johnson v. Andrus (C. C. A. 2nd, 1941), 119 F. (2d) 287 9

Luckenbach v. McCahan Sugar Co. (1918), 248 U. S. 139, 39 S. Ct. 53, 63 L. ed. 170 17

The Lyra, (C. C. A., 9th, 1919) 255 Fed. 667..... 21

The Newport News (D. C., S. D. N. Y., 1912), 199 Fed. 968 10

The Nordhvalen, (D. C., D. Md., 1925) 6 F. (2nd) 883 21

The Oakley C. Curtis (C. C. A. 2nd, 1924), 4 F. (2d) 979, 982, cert. den. 267 U. S. 599, 45 S. Ct. 354, 69 L. ed. 807 19

Panama Mail Steamship Company v. Vargas (1930), 281 U. S. 670, 50 S. Ct. 448, 74 L. ed. 1105 .....11, 15

The Point Chico (1941), 122 F. (2d) 1 .....10, 11

TABLE OF CASES CITED IN BRIEF—Continued.

	Page
Scarborough v. Bartholomew, et al. (1940), 22 N. Y. S. 2d 635	17
The S. C. L. No. 9 (C. C. A. 3rd, 1940), 114 F. (2d) 964	9
Simpson v. Hartranft (1935), 157 Misc. 387, 283 N. Y. S. 754	19
The Wildenfels, (C. C. A., 2nd, 1908) 161 Fed. 864..	21
Yezek v. Delaware, Lackawanna & Western R. R. Co. (1941), 176 Misc. 553, 28 N. Y. S. 2d 34	19

AUTHORITIES CITED IN BRIEF.

	Page
Benedict on Admiralty, Sixth Edition (1941), at page 164, index volume	12
Benedict on Admiralty, Second Edition, § 380	17
Moore's Federal Practice (1938), Vol. 2, p. 2006 et seq., § 17.01	17

STATUTES CITED IN BRIEF.

	Page
Equity Rule 70½	13
Memorandum, reported in 1941 A. M. C. at pages 1569-1572	16
Rule 17 (a) of the Federal Rules of Civil Procedure ..	17
Rule 46½ of the Rules of Practice in Admiralty and Maritime Cases	12, 13

IN THE

Supreme Court of the United States.

No. . October Term, 1941.

PLOW CITY STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "PLOW CITY" (RESPONDENT-APPELLEE IN THE COURT BELOW),

Petitioner,

v.

TEXAS GULF SULPHUR COMPANY, INCORPORATED (LIBELLANT-APPELLANT IN THE COURT BELOW),

Respondent.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

The petition of Plow City Steamship Company respectfully represents:

This is a petition for a writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to review the order of that Court entered on September 11, 1941 (R. 164) reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania (R. 12), which dismissed the libel filed by the respondent, Texas Gulf Sulphur Company, Incorporated, against the Steamship "Plow City", whereof the petitioner, Plow City Steamship Company, is the claimant.

I. STATEMENT OF THE MATTER INVOLVED.

The respondent, Texas Gulf Sulphur Company, Incorporated, brought a libel in rem in the District Court against the Steamship "Plow City" for alleged damage to cargo. Petitioner, Plow City Steamship Company, appeared as claimant of that vessel and defended the action.

During a voyage made by the "Plow City" from Galveston, Texas, to Norfolk, Virginia, in October, 1937, with a cargo of sulphur in bulk belonging to the respondent, a considerable quantity of sea water entered the vessel's No. 1 hold, allegedly damaging the cargo carried therein. The District Court found that, upon all the evidence, the "Plow City" was seaworthy and that the water had entered the No. 1 hold by way of a sounding pipe opening on to the forward well deck, the cap to which pipe had become displaced by the straining of the vessel during a storm, or was missing due to failure to replace it. The District Court held that the alleged damage was proximately caused by the displacement of the cap and the failure of the crew to make more frequent inspection of the sounding pipe, and dismissed the libel on the ground that the "Plow City" was exonerated under the provisions of the Harter Act (February 13, 1893, c. 105, §§ 1-8, 27 Stat. 445, 46 U. S. C. §§ 190-195), and the exceptions contained in the bill of lading and charter party.

Prior to the filing of the libel, Fidelity-Phoenix Fire Insurance Company, respondent's insurer, had paid to respondent the full amount of its claim for damage to the cargo in question, under an agreement in the form commonly known as a "loan receipt", that respondent should repay to the insurer only such amounts as the respondent might recover from third parties on account of the loss.

The District Court held that respondent was entitled to bring suit in its own name for the benefit of the insurer, and that the libel was not subject to dismissal on the ground that it was not brought by the real party in interest.

The Circuit Court of Appeals criticized the trial Court for the "desultory manner" in which hearings were held in the case, and termed its conduct of the trial "an abuse of judicial discretion". The Circuit Court of Appeals also criticized the trial Court for not passing specifically on petitioner's requests for findings of fact but merely affirming them "insofar as they are not at variance with the findings and discussions of facts" in the opinion. The Circuit Court of Appeals did not make any findings of fact of its own.

The Circuit Court of Appeals held that the loss of the cap to the "Plow City's" sounding pipe was not attributable to perils of the sea and that claimant could not avail itself of the exceptions set up in the bill of lading and charter party. The Circuit Court of Appeals further held that, by reason of the provisions of the loan receipt, respondent had not received payment of its claim from the insurer and, therefore, was entitled to bring suit in its own name. Finally, the Circuit Court of Appeals reversed the decree of the District Court and remanded the cause with directions to ascertain the damages and enter judgment for the respondent.

II. STATEMENT OF THE BASIS OF JURISDICTION.

The jurisdiction of this Court is invoked under § 240 (a) of the Judicial Code (March 3, 1911, c. 231, § 240, 36 Stat. 1157; February 13, 1925, c. 229, § 1, 43 Stat. 938; January 31, 1928, c. 14, § 1, 45 Stat. 54; June 7, 1934, c. 426, 48 Stat. 926, 28 U. S. C. § 347).

The jurisdiction of the Federal Courts is invoked under § 24 of the Judicial Code (R. S. § 563, Pars. 8, 9, § 629, Par. 6, March 3, 1911, c. 231, § 24, Par. 3, 36 Stat. 1091, October 6, 1917, c. 97, § 1, 40 Stat. 395, June 10, 1922, c. 216, § 1, 42 Stat. 634, 28 U. S. C. § 41 (3)).

The final decree of the Circuit Court of Appeals for the Third Circuit was entered on September 11, 1941. This petition was filed on December 11, 1941.

III. QUESTIONS PRESENTED.

1. Is it reversible error for a District Court to hold, in an action in admiralty for cargo damage, that the damage resulted from one of two causes (either of which would excuse the shipowner), where the evidence excludes every other reasonable hypothesis?

2. May a Circuit Court of Appeals, in an admiralty case, reverse the decree of the District Court and remand the case with directions merely to ascertain the damages and enter final judgment, where it is held that the District Court has not complied with Rule 46½?

3. Is a cargo owner to whom an insurer has paid the full amount of his claim for damage to his cargo, payment having been made under an agreement that the cargo owner shall repay to the insurer only such amounts as the cargo owner may recover from third parties on account of the loss, the real party in interest entitled to maintain an action in admiralty against such a third party?

4. Does a private carrier have the burden of proving that damage to the bailed property was due to an excepted cause, or does the burden of proving a breach of the carrier's obligation to exercise due care rest upon the property owner who asserts it?

IV. REASONS FOR ALLOWANCE OF THE WRIT.

1. The decision of the United States Circuit Court of Appeals for the Third Circuit, pursuant to which it entered its decree of September 11, 1941, is in conflict with the decision of the United States Circuit Court of Appeals for the Fifth Circuit in the case of *The Point Chico* (1941), 122 F. (2d) 1.

2. In reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania, the United States Circuit Court of Appeals for the Third Circuit so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision: (Rule 46½ of the Rules of Practice in Admiralty and Maritime Cases; *Panama Mail Steamship Company v. Vargas* (1930), 281 U. S. 670, 50 S. Ct. 448, 74 L. ed. 1105.)

3. In holding that respondent and not its insurer is the real party in interest, the United States Circuit Court of Appeals for the Third Circuit decided an important question of federal law which has not been (despite the decision in the case of *Luckenbach v. McCahan Sugar Co.* (1918), 248 U. S. 139, 39 S. Ct. 53, 63 L. ed. 170), but should be, settled by this Court. (See *Scarborough v. Bartholomew et al.* (1940), 22 N. Y. S. 2d 635.)

4. The decision of the United States Circuit Court of Appeals for the Third Circuit is in conflict with the decision of this Court in the case of *Commercial Molasses Corp. v. New York T. B. Corp.,* (1941) U. S. , 62 S. Ct. 156, 86 L. ed. Adv. Ops. 125.

V. PRAYER FOR WRIT OF CERTIORARI.

WHEREFORE, your petitioner respectfully prays that a writ of certiorari may be issued out of and under the seal

of this Court, directed to the United States Circuit Court of Appeals for the Third Circuit, commanding said Court to certify and send to this Court on a day certain to be thereafter designated, a full and complete transcript of the record of the proceedings in said Court entitled "Texas Gulf Sulphur Company, Inc. v. Steamship 'Plow City' and Plow City Steamship Company, her Claimant, No. 7648, October Term, 1940" to the end that said cause may be reviewed and determined by this Court; that petitioner may have such relief as this Court may deem proper; and that the opinion and decrees of said United States Circuit Court of Appeals for the Third Circuit may be reversed by this honorable Court.

PLOW CITY STEAMSHIP COMPANY,

By .....

GEORGE E. BEECHWOOD,

JAMES S. BENN, JR.,

CONLEN, LABRUM & BEECHWOOD,

Proctors for Petitioner.

CERTIFICATION.

I hereby certify that I am a member of the bar of the Supreme Court of the United States; that I am proctor for Plow City Steamship Company, the petitioner; that the foregoing petition has been prepared in accordance with the request of petitioner; that the allegations in said petition are true to the best of my knowledge, information and belief; and that said petition is not made for the purpose of delay or prolongation of litigation; and is in my opinion well founded in law and in fact, and should be granted.

GEORGE E. BEECHWOOD.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I. OPINIONS OF THE COURTS BELOW.

The opinion of the District Court (per District Judge Welsh) was filed on May 17, 1940 (R. 4) and is not reported.

The opinion of the Circuit Court of Appeals for the Third Circuit (per Circuit Judge Biggs) was filed on September 11, 1941 (R. 159) and is reported in 122 F. (2d) 816, and in 1941 A. M. C. 1564. A memorandum which was filed by Judge Welsh on September 12, 1941 (not a part of this Record) is reported in 1941 A. M. C. 1569.

II. JURISDICTION OF THE COURT.

A statement of the grounds on which the jurisdiction of this Court is invoked appears in the petition, *ante*, at pages 3, 4.

III. STATEMENT OF THE CASE.

A statement of the case appears in the petition, *ante*, at pages 2, 3.

IV. SPECIFICATIONS OF ERROR.

(a) The Circuit Court of Appeals for the Third Circuit erred in reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania.

(b) The Circuit Court of Appeals for the Third Circuit erred in not affirming the decision of the District Court of the United States for the Eastern District of Pennsylvania insofar as that decision held that the "Plow City" was seaworthy, that the proximate cause of the damage

was a cause within the exemptions provided by the Harter Act and the exceptions contained in the bill of lading and charter party, and that the libel should be dismissed.

(c) The Circuit Court of Appeals for the Third Circuit erred in reversing the decree of the District Court of the United States for the Eastern District of Pennsylvania and remanding the cause with directions merely to ascertain the damages and enter final judgment, instead of remanding the cause with directions to make findings of fact in compliance with Rule 46½.

(d) The Circuit Court of Appeals for the Third Circuit erred in not reversing the decision of the District Court of the United States for the Eastern District of Pennsylvania insofar as that decision held that the respondent is the real party in interest and entitled to bring the action.

(e) The Circuit Court of Appeals for the Third Circuit erred in reversing the decision of the District Court of the United States for the Eastern District of Pennsylvania and holding that petitioner had the burden of proving the "Plow City" was seaworthy.

V. ARGUMENT.

(a) Certiorari Should Be Granted in Order to Reverse the Decision of the Circuit Court of Appeals for the Third Circuit and Resolve the Conflict Between That Decision and the Decision of the Circuit Court of Appeals for the Fifth Circuit.

In the opinion of the Circuit Court of Appeals in this case it is stated that the District Judge's finding that the "Plow City" was seaworthy was based upon nothing more than conjecture (122 F. (2d) 818). The alleged absence of proof of seaworthiness is then compared with the fact

that "there is testimony tending to prove that the thread upon the No. 1 sounding pipe and the thread of its cap were defective" (122 F. (2d) 818). The Circuit Court of Appeals, however, made no specific finding that any such defective condition ever existed.

How it was possible for the Circuit Court of Appeals to overlook all of the evidence of seaworthiness produced by the petitioner is difficult to understand. Ten witnesses, among them marine surveyors and an inspector from the United States Bureau of Marine Inspection and Navigation, gave testimony in open court in support of this point, and the depositions were taken of two others. It is obvious from the District Court's opinion that this preponderance of evidence convinced the District Judge beyond the slightest doubt that the "Plow City" was seaworthy in every respect when she sailed from Galveston. Nevertheless, having decided that the District Judge's finding was supported only by conjecture, it was a simple matter for the Circuit Court of Appeals to dispose of the merits of the case without reference to the familiar rule that the findings of the District Court, sitting in Admiralty, are entitled to great weight and should not be set aside except upon a showing that they are clearly wrong or are not supported by competent evidence: *The S. C. L. No. 9* (C. C. A. 3rd, 1940), 114 F. (2d) 964; *Johnson v. Andrus* (C. C. A. 2nd, 1941), 119 F. (2d) 287; *Eastern Tar Products Corporation et al. v. Chesapeake Oil Transport Co. et al.* (C. C. A. 4th, 1939), 101 F. (2d) 30; *The Heranger* (C. C. A. 9th, 1939), 101 F. (2d) 953.

If the finding of the District Court in this case that the "Plow City" was seaworthy is permitted to carry the weight which is properly to be accorded to it, it is at once apparent that the only way in which it was physically pos-

sible for the cap to the No. 1 sounding pipe to have become displaced was through removal by some human agency or through its working loose by reason of the straining of the vessel. The District Court so found, and following the decision of Judge Hough in *The Newport News* (D. C., S. D. N. Y., 1912), 199 Fed. 968, held that petitioner was exonerated from liability. This conclusion, however, was rejected by the Circuit Court of Appeals on the ground that "There is no evidence that any person failed to replace the missing cap", and, as stated above, because there was testimony that the cap and pipe were defective.

In contrast to the manner in which the Circuit Court of Appeals for the Third Circuit disposed of the present case is the reasoning of the Circuit Court of Appeals for the Fifth Circuit in the case of *The Point Chico* (1941), 122 F. (2d) 1. There, cargo was damaged by sea water which entered the vessel's hold in precisely the same manner as it did in this case—through a sounding pipe, the cap to which had become displaced. The District Court found that the vessel was seaworthy. It then concluded that the cap must have been removed by one of the crew who forgot to replace it.

On appeal it was argued that the District Court's finding was based upon mere conjecture. In answer to this contention the Circuit Court of Appeals for the Fifth Circuit in an opinion by Circuit Judge Foster, stated:

> "Libellants argue respondent has offered no direct evidence as to how the plug was left out and has not sustained the burden of proving that defense. Respondent was not required to do the impossible. We think the circumstantial evidence was sufficient to prove the contention. The reasonable conclusion is that the plug was left out of the sounding pipe by the negligence

of a member of the crew. In fact, every other reasonable hypothesis is excluded." (3)

The Circuit Court of Appeals therefore affirmed the decision of the lower Court.

It is submitted that the decision of the Circuit Court of Appeals for the Third Circuit in the instant case is in direct conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Point Chico, supra.* It is further submitted, therefore, that certiorari should be granted to reverse the decision of the Circuit Court of Appeals for the Third Circuit and resolve said conflict.

(b) Certiorari Should Be Granted to Reverse the Decision of the Circuit Court of Appeals in Order to Correct That Court's Departure From the Accepted and Usual Course of Judicial Proceedings.

In *Panama Mail Steamship Company v. Vargas* (1930), 281 U. S. 670, 50 S. Ct. 448, 74 L. ed. 1105, the District Court entered a decree awarding damages without delivering any opinion or making findings of fact. This decree was affirmed by the Circuit Court of Appeals on the ground that "appellate courts refuse to review decisions of trial courts based on conflicting testimony taken before them, unless the record discloses some plain error of fact or some misapplication of the law" (281 U. S. 671). This Court granted certiorari, vacated the decrees of both courts below, and remanded the cause to the District Court with directions to make specific findings of fact. Mr. Justice Van Devanter who delivered the opinion of the Court, stated:

"Formerly it was the general practice in suits in admiralty to make distinct findings on the issues of

fact; and while that practice placed an added duty on trial judges it was attended with undoubted advantages, in that it made for greater precision in the disposal of such suits in the trial courts and facilitated the presentation and consideration of appeals from decrees therein." (281 U. S. 672.)

This decision was delivered on June 2, 1930. The same day this Court promulgated Rule 46½ of the Rules of Practice in Admiralty and Maritime Cases and it was ordered that the new Rule should become effective October 1, 1930. The Rule provides:

> "In deciding cases of admiralty and maritime jurisdiction the court of first instance shall find the facts specially and state separately its conclusions of law thereon; and its findings and conclusions shall be entered of record and, if an appeal is taken from the decree, shall be included by the clerk in the record which is certified to the appellate court under rule 49." (28 U. S. C. A., following Section 723, p. 35.)

This rule was received not without some disapproval, and eventually a request was presented to Chief Justice Hughes by a committee of the Maritime Law Association that the requirements of the rule be relaxed. In Benedict on Admiralty, Sixth Edition (1941), at page 164 of the index volume, there appears this note:

> "In October, 1940, Chief Justice Hughes, replying to a request presented by a committee of the Maritime Law Association that General Admiralty Rule 46½, relating to findings of fact and conclusions of law, should be relaxed or interpreted so as to permit the decree to recite that the opinion of the District Court should be adopted and stand as the findings and conclusions, stated that such an interpretation would not

be acceptable; the Chief Justice stated that separately stated and numbered findings of fact and conclusions of law should be made a part of every record on appeal."

In the present case the District Court affirmed petitioner's requests for findings of fact "insofar as they are not at variance with the findings and discussions of facts" in the opinion. The facts are fully discussed in the opinion of the District Court. However, the Circuit Court of Appeals drew particular attention to the District Court's ruling on petitioner's requests and stated:

"Such a method of fact finding lacks clarity and coherence and does not comply with Rule 46½. Findings of fact should be clear, coherent and self-sustaining."

It must be conceded that, technically, the method of fact finding followed by the District Judge in this case was a deviation from the strict requirements of the rule. In *Interstate Circuit v. United States* (1938), 304 U. S. 55, 58 S. Ct. 768, 82 L. ed. 1146, this Court held that the opinion of a District Court is not a substitute for the findings required by Equity Rule 70½, which is similar in its provisions to Admiralty Rule 46½. Nevertheless, the assertion that the findings of the District Court in this case lack clarity or coherence is hardly warranted.

With regard to the condition of No. 1 sounding pipe and cap the District Court was requested to find as follows:

"(40) The sounding pipe leading into the afterwell or bilge cofferdam of the No. 1 hold of the Steamship 'Plow City' and the cap thereto were in good condition at the commencement of the voyage from Galveston, Texas, on October 10, 1937." (R. 153.)

"(42) The Steamship 'Plow City' was seaworthy with respect to the sounding pipe leading into the after-

well or bilge cofferdam of the No. 1 hold and the cap thereto, at the commencement of the voyage from Galveston, Texas, on October 10, 1937." (R. 154.)

In its opinion, the District Court said:

"From all of the testimony and particularly the testimony of the third mate, we are convinced that the sounding pipe and cap in question were not so defective as to render the vessel unseaworthy in that respect." (R. 8-9.)

The findings requested, therefore, were not only not at variance, but in accord, with the opinion, and it follows that they were expressly affirmed.

The District Court was further requested to find as follows:

"(33) The forward well of the No. 1 hold of the Steamship 'Plow City' and the manhole covers and gaskets thereto, were tight and in good condition at the commencement of the voyage from Galveston, Texas, on October 10, 1937. (R. 152.)

"(34) The Steamship 'Plow City' was seaworthy with respect to the forward well of the No. 1 hold, and the manhole covers and gaskets thereto at the commencement of the voyage from Galveston, Texas, on October 10, 1937." (R. 152.)

In its opinion, the District Court said:

"We therefore find that the 'Plow City' was seaworthy at the time of the voyage with regard to the manhole covers in the forward hold." (R. 10-11.)

Plainly these requests were also affirmed. Nevertheless, the Circuit Court of Appeals saw fit to emphasize that,

"There was also evidence that the gaskets on two manhole covers were defective" (122 F. (2d) 818).

In all petitioner submitted forty-four separate findings of fact (R. 147-154). If they are read together with the opinion it is manifest that the District Court intended to, and did, affirm all of them. The facts being thus established, the conclusion that the "Plow City" was seaworthy at the inception of the voyage followed inevitably.

Apparently the effort on the part of the District Judge to signify affirmance of petitioner's requests for finding of fact served only to nullify for the Circuit Court of Appeals the effect of the evidence which supported those requests. The opinion of the Circuit Court of Appeals points with particularity only to such testimony as happens to be contradictory to that evidence. If the District Court's method of fact finding was subject to criticism, the Circuit Court of Appeals' method of disposing of the case without attempting to review more than a portion of the record before it, or to make any findings of its own can hardly be regarded as exemplary of proper practice.

Assuming, therefore, that the District Court's opinion, together with petitioner's requests, did not constitute sufficiently clear, coherent or self-sustaining findings of fact, it was certainly not the province of the Circuit Court of Appeals to hold that the trial Judge's failure to comply with Rule 46½ required the reversal of the decision and the summary entry of judgment for the opposing party. Such procedure is tantamount to charging the litigant with responsibility for the Trial Judge's errors. Manifestly, the accepted and usual course of judicial proceeding in cases of this character, as indicated by this Court in the case of *Panama Mail Steamship Company v. Vargas, supra,*

and the contemporaneous Rule 46½, dictated that the cause be remanded to the District Court, which was the court of first instance referred to in that rule, with directions to make separately stated and numbered findings of fact. Until proper findings are made in any case it is just as impossible to render a decision in favor of one party as the other.

The criticism of the Trial Judge for the "desultory manner" in which hearings were held in this case, amounting, in the words of the opinion of the Circuit Court of Appeals, to "an abuse of judicial discretion on the part of the trial court which this court cannot overlook", introduces into the case an element which was not the basis of complaint to the appellate court. It prompted the Trial Judge to file the memorandum which is reported in 1941 A. M. C. at pages 1569-1572, and is herewith reprinted in full in the appendix to this brief. Whether or not this criticism was merited, the fact that the trial of a case by the District Court may have been attended by delays, is no justification for remanding the cause with directions to dispose of it forthwith by entering final judgment, where further proceedings by the lower court are clearly required.

It is submitted that certiorari should be granted because the Circuit Court of Appeals for the Third Circuit so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

(c) Certiorari Should Be Granted in Order That This Court May Settle the Important Question Whether an Insurer Who Makes Payment Under a Loan Receipt or the Assured Is the Real Party in Interest.

As long ago as 1870 it was definitely established as a general rule in Admiralty that actions must be prosecuted in the name of the real party in interest: Benedict on Admiralty, Second Edition, § 380. This same practice has been widely adopted by rule of Court in other civil actions. The outstanding example is Rule 17 (a) of the Federal Rules of Civil Procedure, which provides:

> "Every action shall be prosecuted in the name of the real party in interest; . . ." (28 U. S. C. A. following Section 723 (c), p. 502.)

Similar rules have been adopted in a great many jurisdictions: See Moore's Federal Practice, (1938) Vol. 2, p. 2006 et seq., § 17.01.

Both the District Court and the Circuit Court of Appeals in the present case held, on the authority of *Luckenbach v. McCahan Sugar Co.,* (1918) 248 U. S. 139, 39 S. Ct. 53, 63 L. ed. 170, that respondent was entitled to maintain this action in its own name, and it is true that, in the past, the Luckenbach case was universally accepted as authority for the proposition that an insurer who makes payment under a loan receipt is not a necessary party to an action against a third person to recover on account of the loss. Recently, however, that decision has been more closely examined and there has been a tendency in some cases to confine the decision to the facts in that case.

This development can be no better illustrated, perhaps, than by the case of *Scarborough v. Bartholomew, et*

al., (1940) 22 N. Y. S. 2d 635. There an automobile covered by a collision policy was damaged by the alleged negligence of a third party. Action was instituted in the name of the insured against the third party. Section 210 of the New York Civil Practice Act provides that every action must be prosecuted in the name of the real party in interest. The defendant moved to make the insurer a party on the ground that the insurer, having advanced money to the insured under an agreement to refund the same to the extent that the insured recovered from any third party, had made payment under the policy and had become subrogated to the rights of the insured (except for a $50.00 deductible). The motion was granted. The Court in discussing the Luckenbach case, stated:

> "It seems that the tendency of the Jurists in the cases cited by the plaintiff is to give weight to the statement made by Justice Brandeis in the case of Luckenbach v. W. J. McCahan Sugar Refining Co., 248 U. S. 139, 39 S. Ct. 53, 55, 63 L. Ed. 170, 1 A. L. R. 1522. Justice Brandeis, writing for the Court said: 'The carrier (a common carrier) insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan, is to follow the letter of agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying its effect. * * * ' "
>
> "The above quotation from the Luckenbach case, one of the initial cases in which loan receipts made their appearance, is quoted verbatim in practically all those cases in which loan receipts are upheld and its effect upon these cases is undeniable.
>
> "As stated before, the loan receipts apparently originated in a situation presented by the Luckenbach

> case, which situation is quite unlike that of the present case. In the Luckenbach case the common carrier, who was under an insurer's liability, required the shipper of the cargo to sign a bill of lading which included a provision to the effect that any insurance the shipper might have on the cargo would enure to the benefit of the carrier. The Loan receipt was devised to avoid the shifting of the loss to the insurance company from the common carrier, who should have borne the loss, because of its common law insurer's liability. It is obvious, therefore, that the Luckenbach decision was necessitated by reason of equity and substantial justice and it is quite unlikely that even Justice Brandeis would have sanctioned its extension to cases such as the present case, where the defendant is liable only in the case of his negligence. Justice Cregg, in the case of Simpson v. Hartranft, 157 Misc. 387, 283 N. Y. S. 754, 757, in referring to the holding of the Luckenbach case, recognizes the distinction in his statement: 'The equities of the case required a holding that the money advanced was a loan.' " (637-8.)

In the present case the reasons which necessitated the Luckenbach decision likewise do not exist. The "Plow City" was not a common carrier, but a private carrier liable only for negligence [*The Doyle,* (C. C. A. 3rd, 1939) 105 F. (2d) 113, 114; *The Oakley C. Curtis* (C. C. A. 2nd, 1924), 4 F. (2d) 979, 982, cert. den. 267 U. S. 599, 45 S. Ct. 354, 69 L. ed. 807; *The C. R. Sheffer,* (C. C. A. 2nd, 1918), 249 Fed. 600, 601], and there is no "benefit of insurance" clause in either the bill of lading or the charter party.

Other decisions which distinguish the Luckenbach case are *Simpson v. Hartranft,* (1935) 157 Misc. 387, 283 N. Y. S. 754, and *Yezek v. Delaware, Lackawanna & Western R. R. Co.,* (1941) 176 Misc. 553, 28 N. Y. S. 2d 34.

In view of the fact that it is the common practice of marine underwriters, and, indeed, of underwriters in gen-

eral, to make use of loan receipts in adjusting losses, it is quite important that this Court clearly decide whether or not the rule of the Luckenbach case is to be extended to cases where the exigencies which necessitated that decision do not exist. The fact that modern rules of practice, particularly the Federal Rules of Civil Procedure, require that actions be instituted in the name of the real party in interest, adds to this case a significance far greater than the mere adjudication of the rights of this petitioner and respondent.

It is submitted that certiorari should be granted to enable this Court to settle this important question of law.

(d) Certiorari Should Be Granted in Order to Reverse the Decision of the Circuit Court of Appeals for the Third Circuit and Resolve the Conflict Between That Decision and the Decision of This Court.

The Circuit Court of Appeals for the Third Circuit made the following statement as to what it considered to be the law applicable to this case:

> "The question presented for our determination is a very simple one. There was a warranty by the ship owner that the Plow City was seaworthy at the beginning of the voyage. A vessel which takes in such quantities of water as to put her down at the head a few days after leaving port cannot be presumed to have been seaworthy when she left port. That fact must be affirmatively proven. The Edwin I. Morrison, 153 U. S. 199, 210, 14 S. Ct. 823, 38 L. Ed. 688; The Medea, 9 Cir., 179 F. 781. The owner therefore had the burden of proving that the Plow City was seaworthy when she departed from Galveston." (122 F (2d) 818.)

The "Plow City", however, was a private, not a common, carrier: *The Fri,* (C. C. A., 2nd, 1907); 154 Fed. 333;

The G. R. Crowe, (C. C. A., 2nd, 1923), 294 Fed. 506; *The Wildenfels,* (C. C. A., 2nd, 1908) 161 Fed. 864; *The C. R. Sheffer,* (C. C. A., 2nd, 1918) 249 Fed. 600; *The Lyra,* (C. C. A., 9th, 1919) 255 Fed. 667; *The Nordhvalen,* (D. C., D. Md., 1925) 6 F. (2nd) 883. This fact was expressly recognized by the Circuit Court of Appeals:

> "*The fact that the Plow City was a contract rather than a common carrier* is of little significance [in connection with the effect of the loan receipt] since there is no doubt that the insurer is liable upon its insurance contract." (122 F. (2nd) 819; italics supplied.)

In *Commercial Molasses Corp. v. New York T. B. Corp.,* (1941) U. S. , 62 S. Ct. 156, 86 L. ed. Adv. Ops. 125, this Court clarified the distinction between the obligations of private carriers and those of common carriers and pointed out that in the case of private carriers "the burden of proving the breach of duty or obligation rests upon him who must assert it as the ground of the recovery which he seeks" (86 L. ed. Adv. Ops. 129), and that, unlike a common carrier, a private carrier does not have the burden of showing that the loss was due to an excepted cause and not to breach of the duty to furnish a seaworthy vessel.

It is submitted, therefore, that the Circuit Court of Appeals for the Third Circuit, in holding that the burden of proving that the "Plow City" was seaworthy when she left Galveston rested on petitioner, erroneously applied to a case of private carriage the rules relating to cases of common carriage. It is further submitted that the decision of the Circuit Court of Appeals should be reversed in order to resolve the conflict between that decision and the decision of this Court in the case of *Commercial Molasses Corp. v. New York T. B. Corp., supra.*

VI. CONCLUSION.

It is submitted that certiorari should be granted to reverse the decision of the United States Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

GEORGE E. BEECHWOOD,
JAMES S. BENN, JR.,
CONLEN, LABRUM & BEECHWOOD,
Proctors for Petitioner.

Appendix.

TEXAS SULPHUR COMPANY, INCORPORATED,
Libellant-Appellant,

v.

STEAMSHIP PLOW CITY, AND PLOW CITY STEAMSHIP COMPANY, HER CLAIMANT,
Respondent-Appellee.

MEMORANDUM IN RE PROCEEDINGS.

WELSH, D. J., September 12, 1941:

There came to my desk yesterday afternoon the official copy of the opinion of the Circuit Court of Appeals in the above case. Judicial etiquette, personal regard, and official respect make it difficult for me to comment on the subject further than to recount the actual steps taken in the case. Personal feelings have no weight in the matter. But inasmuch as the opinion reflects upon the efficiency of the Court for the Eastern District of Pennsylvania and has been given wide publicity, I feel it my duty as a District Judge to make a statement of the actual facts and conditions under which this case was tried.

The case was one that was vigorously contested by opposing counsel. Neither side would compromise any phase of the subject, and each insisted on his strict legal rights. This is not said in criticism. At the time this case was first listed for trial, March 2, 1939, until its final conclusion on Decemebr 7, 1939, I can say that there was

no delay in the procedure which the Trial Judge could in any way have avoided. At that time Judge DICKINSON was not well and we were lacking two judges which were subsequently provided by Congress to meet the requirements of the overcrowded calendar in this District. The case was listed again for March 3, 1939, and March 7, 1939. Then came the big term of criminal court, which lasted to April. From March 7, 1939, due to the criminal business of the Government, which devolved at that time almost entirely upon me, the case was listed for the 5th of April. On this date counsel for the respondent could not be present because of professional duties elsewhere. Immediately after that a most important witness who had been subpœnaed by the libellant had to leave on his ship for the Pacific Coast, and counsel for libellant said he did not know just when he would return. This was apparently followed by the taking of certain depositions. The witness who left for the Pacific Coast did return on or about June 12. This was right in the middle of the June term of criminal court. The Government had important cases, with large numbers of witnesses under subpœna. Notwithstanding that, the case was listed specially for the week following (June 19th) and in order to meet the necessities of the case the Court held an evening session, for which counsel expressed appreciation. The June criminal court continued until the last of June or early in July when the summer recess took effect. On August 31, 1939, counsel for the libellant asked for a continuance until late in September. No objection was made to this request which was personal in nature.

The September term of criminal court began on the third Monday of that September and was one of the most

important sessions of that year. It lasted well along until the end of October. The Clerk of the court had been instructed at the outset to list this case at every available opportunity, and the first dates open after the September criminal court closed in October were November 27th, 28th and 29th, when full hearings were had. The next available dates were December 5th, 6th and 7th, 1939, on which dates the hearings were conducted. I could not ask another Judge to try this case as I had already proceeded with the hearings.

The Court wishes to state that early in the proceedings he offered to sit at night so that this case could be conducted with dispatch. This suggestion did not meet with approval, so only one night session was held.

It should also be stated that during this time the Philadelphia Rapid Transit Company reorganization was before me; it had reached the crucial stage leading up to a hoped-for final solution of a vexing problem of years. The Court also wishes to state that on every day during this period he was in court, with the exception of certain Saturdays and legal holidays.

I am not surprised that a reading of the bare chronology of trial dates by the Judges of the Circuit Court should cause some wonderment as to the length of time over which the case was spread. I personally have very acute recollections of the amount of time taken by this case, and during the progress of the trial, being somewhat impatient at the delays, I used the following language from the bench (this language appears on pages 581, 582 and 583 of the stenographic notes of the testimony):

"I don't mind telling you gentlemen—I don't want to say this in criticism, I esteem you gentlemen too much to

criticize you—this case has taken too long to try. I am not at all satisfied with the conduct of this case.

"We were discussing in the Circuit Court of Appeals yesterday just a typical case of this nature. We were discussing the welfare of matters in this district in accordance with the Act of Congress recently passed. We all understood in admiralty cases we had to have a little bit more latitude, and cases had to be prolonged in their preparation and in their defense because of the absence of the men on board the ships.

"But if this district is to keep up the standard of efficiency that it would like to keep up and maintain we have to proceed with more expedition and a little bit more efficiency in these trials. As far as I am concerned, I expect to try a great deal of admiralty work here. Now that Judge DICKINSON has passed away I expect to take over a great deal of the admiralty work, and I want to do everything I possibly can to make this forum a proper place for trying admiralty cases. I want to build up our port, I want to build up our admiralty bar. The only way we can do both is for counsel, and the Court, and the ship owners, and everybody concerned to make it an efficient forum for the adjudication of disputes, and it can't be done if we are going to resort to unnecessary delay."

Long experience has taught me that you cannot try an admiralty case like this in consecutive hearings as you would an ordinary civil suit. The men who go down to the sea in ships for generations have not been dealt with in accordance with the strict rules of the usual judicial procedure. No single trial Judge can revise this system.

BILL OF LADING—LIBELLANT'S EXHIBIT 1.

(Printed at Request of Counsel for Respondent.)

B/L No

Cable Address: Lonstarsul, New York.

TEXAS GULF SULPHUR COMPANY

(Incorporated)

Mines at
Gulf, Matagorda County, Texas.
Newgulf, Wharton County, Texas.
Long Point, Fort Bend County, Texas.

General Offices
75 East Forty-Fifth Street
New York

Ocean Shipping Office
Galveston, Texas

Cargo

1015	Gross	tons	in	1	Hold
1786	"	"	"	2	"
1650	"	"	"	4	"
400	"	"	"	5	"
	"	"	"		"
	"	"	"		"
	"	"	"		"

Total 4851 Gross Tons

Time used in loading 8 Hrs 45 Mins

It Is Also Mutually Agreed that this shipment is subject to all the terms, provisions of, and all the exemptions from liability, contained in the Act of Congress of the United States, entitled "An Act relating to navigation of vessels, etc., approved on the 13th day of February, 1893, and of the Statutes amendatory thereof, and supplemental thereto.

SHIPPED in good order and condition by

TEXAS GULF SULPHUR COMPANY, INCORPORATED

in and upon the good AMERICAN STEAMSHIP called the PLOW CITY whereof R. KRAMER is Master for the present Voyage and bound for NORFOLK, VA. with liberty to call at any ports, to sail without pilots, and to tow and assist vessels in distress, and to deviate for the purpose of saving life and property:

FORTY EIGHT HUNDRED FIFTY ONE (4851) GROSS TONS
CRUDE SULPHUR IN BULK

which are to be delivered in like good order and condition at the said Port of NORFOLK, VA.

The Act of God, the King's Enemies, Restraint of Princes and Rulers, Perils of the Sea excepted. Also Fire, Barratry of the Master and Crew, Pirates, Collisions, Stranding, and Accidents of Navigation, or latent defects, in, or accidents to, Hull, and/or Machinery, and/or Boilers always excepted, even when occasioned by the negligence, default or error in judgment of the Pilot, Master, Mariners, or other persons employed by the Shipowner, or for whose Acts he is responsible, not resulting, however, in any case from want of due diligence by the Owner of the Ship, or by the Ship's Husband or Manager.

Unto ~~order of~~ TEXAS GULF SULPHUR COMPANY
~~Notify~~ c/o NORFOLK TIDEWATER TERMINALS, NORFOLK, VA. or THEIR Assigns, he or they paying freight for the same as per Charter Party dated MARCH 26th., 1937 all the terms and exceptions contained in which Charter are herewith incorporated.

General Average payable according to York/Antwerp Rules, 1924.

IN WITNESS WHEREOF, the Master or Agents of said Ship hath signed THREE Bills of Lading, all of this tenor and date, drawn as a set consecutively numbered, any one of which being accomplished, the others to be void.

R. K.
Master.

Galveston, Texas, OCTOBER 10th., 1937

(Loaded at Pier 35)

JAN 5 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941.

No. 795.

PLOW CITY STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "PLOW CITY" (Respondents-Appellee in the Court Below),

Petitioner,

v.

TEXAS GULF SULPHUR COMPANY, INCORPORATED (Libellant-Appellant in the Court Below),

Respondent.

Respondent's Brief in Opposition to Petition for Writ of Certiorari.

OTTO WOLFF, JR.,
208 South 4th Street,
Philadelphia, Pa.
Proctor for Respondent.

International, 236 Chestnut St., Philadelphia

TABLE OF CONTENTS OF BRIEF.

	Page
I. Statement of the Case	1
II. Argument	6
(a) The decision rendered by the Circuit Court Court of Appeals for the Third Circuit is not in conflict either with the decision of the Circuit Court of Appeals for the Fifth Circuit in *The Point Chico,* 122 Fed. (2d) 1, or with the decision of this Court in *Commercial Molasses Corp. v. New York T. B. Corp.,* 86 L. ed. Adv. Ops. 125....	6
(b) In reaching its conclusions, the Circuit Court of Appeals for the Third Circuit did not depart from the accepted and usual course of Judicial proceedings	9
(c) The respondent was entitled to file, in its own name, a libel against the "Plow City"	10
III. Reasons Why the Petition Should Be Denied..	12

TABLE OF CASES CITED IN BRIEF.

	Page
Commercial Molasses Corp. v. New York T. B. Corp., 86 L. ed. Adv. Ops. 125	7, 8
The Edwin I. Morrison, 153 U. S. 199, 38 L. ed. 688.	7, 8
Judd & Root v. N. Y. & T. S. S. Co., 128 Fed. 7.....	11
Luckenbach v. McCahan Sugar Refining Co., 248 U. S. 139, 63 L. ed. 170	10
Panama Mail Steamship Company v. Vargas, 281 U. S. 670, 74 L. ed. 1105	9
The Point Chico, 122 Fed. (2d) 1	6

IN THE

Supreme Court of the United States.

No. 795. October Term, 1941.

PLOW CITY STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "PLOW CITY" (RESPONDENT-APPELLEE IN THE COURT BELOW),

Petitioner,

v.

TEXAS GULF SULPHUR COMPANY, INCORPORATED (LIBELLANT-APPELLANT IN THE COURT BELOW),

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

I.

STATEMENT OF THE CASE.

On October 10, 1937, the respondent, Texas Gulf Sulphur Company, Inc., shipped and placed on board the Steamship "Plow City", at Galveston, Texas, a cargo of sulphur, in bulk, for carriage to Norfolk, Va., and delivery there in like good order and condition as when received. A few days after leaving Galveston sea water entered the vessel's No. 1 cargo hold, where a portion of the respondent's cargo had been stowed, in such quantities as to put her down at the head; and after turning into Savannah, where an emergency pump was installed in the vessel's forepeak, and a temporary certificate of seaworthiness was

issued to her, she continued her voyage to Norfolk, and there delivered her cargo of sulphur to the respondent in a damaged condition.

The bill of lading issued by the master of the vessel (see copy attached to the petition, pp. 27 and 28) was an undertaking to deliver the respondent's cargo at Norfolk, "in like good order and condition" as when received at Galveston, subject to certain excepted causes of loss or damage (which did not include unseaworthiness), as the same are expressly set forth in the bill of lading, and as contained in a certain charter party, incorporated in the bill of lading by reference, in which the owners of the vessel expressly warranted that she was "tight, staunch and strong, and in every way fitted for the voyage", and was "to be maintained in such condition by the owners during the voyage".

The respondent, alleging that its cargo of sulphur had been damaged because of the unseaworthiness of the "Plow City", filed a libel against the vessel, *in rem,* for the recovery of its loss. The District Court dismissed the libel, upon the ground that the "Plow City" was seaworthy, and that the respondent's loss had resulted from a peril of the sea, for which the vessel was not answerable. The findings and conclusions of the District Court, as set forth by it in its opinion (Transcript of Record, page 4) were as follows, *italics supplied:*

> "The libellant bases its claim upon the allegation that the vessel was unseaworthy in that the threads on the No. 1 sounding pipe and cap were worn and defective so that the cap was misplaced during the voyage, permitting sea water to enter into the No. 1 bilge, which was below and to the rear of the No. 1 hold, and from there into the hold through drain open-

ings between the hold and the bilge. Libellant also alleges that the gaskets on the man-hole cover between the bottom of the hold and the chain locker cofferdam were defective and permitted water to enter the hold from the cofferdam which had become flooded during the voyage. Other possible sources were described by the witnesses but appear to have been eliminated by both parties in the course of the trial and arguments."

. . . . . .

"From all of the testimony and particularly the testimony of the third mate, we are convinced that the sounding pipe and cap in question were not *so defective* as to render the vessel unseaworthy in that respect. *It is conceivable* that through exposure and corrosion the threads on the pipe parts *might* become gradually less effective, but we do not think the subsequent rethreading of the pipes is conclusive evidence that they were *so worn* as to be useless at the time of the accident, and, in making general repairs, it is *quite probable* that many parts were renewed or improved before they became defective to the point of rendering the vessel unseaworthy."

. . . . . .

"It *would appear* that the sounding pipe cap on the 'Plow City', like that involved in the case of The Newport News (199 Fed. 968), became loosened and displaced by the straining of the vessel, which fact was not discovered because of the difficulty of inspection during the two-day storm."

. . . . . .

"The violence of the sea in the present case was sufficient to account for the displacement of the sounding pipe cap and the failure of the crew to discover it before damage occurred, and therefore constituted a peril of the sea."

The Circuit Court of Appeals for the Third Circuit reversed the decree of the District Court, and remanded the cause with directions to ascertain the damages sustained by the respondent, and to enter a final decree for such sum, for the following reasons, *italics supplied* (Transcript of Record p. 159):

> "The evidence shows that on the afternoon of October 17th the mate went forward and discovered that the sounding pipe cap of the No. 1 sounding pipe within the mast-stand was missing; that the mate stopped up the pipe with a plug of wood and the vessel proceeded to Savannah. The water could have entered the No. 1 bilge through the No. 1 sounding pipe and overflowed thence into the No. 1 hold through the open grating between the bilge and the bottom of the hold. There was also evidence that the gaskets on two manhole covers were defective, which would have permitted water to come into the hold from a cofferdam which had become flooded. *During the height of the storm, according to the ship's log as testified to by the captain, the wind velocity was Force Eight on the Beaufort Scale. This was at a rate from 34 to 40 miles an hour and the seas were high.*
>
> "The repairs made to the Plow City at Chester included the rethreading of sounding pipes including the sounding pipe to the No. 1 bilge."
>
> . . . . . .
>
> "The question presented for our determination is a very simple one. *There was a warranty by the shipowner that the Plow City was seaworthy at the beginning of the voyage. A vessel which takes in such quantities of water as to put her down at the head a few days after leaving port cannot be presumed to have been seaworthy when she left port.* That fact must be affirmatively proved. The Edwin I. Morrison, 153 U. S. 199, 210; The Medea, 179 Fed. 781. The

owner therefore had the burden of proving that the Plow City was seaworthy when she departed from Galveston. The learned District Judge found that the vessel was seaworthy, *but this was based upon nothing more than his conjecture that the No. 1 sounding pipe and its cap '* * * were not so defective as to render the vessel unseaworthy * * *'*. He went on to say, 'Whether the cap was displaced by the motion and straining of the vessel, or was missing due to the failure of some person to replace, is unimportant for present purposes inasmuch as both causes come within the exemptions of the Harter Act and the charter party agreement'. There is no evidence that any person failed to replace the missing cap. On the other hand *there is testimony tending to prove that the thread upon the No. 1 sounding pipe and the thread of its cap were defective* so that the cap was dislodged by the pitching of the vessel, permitting water to enter the No. 1 bilge through the sounding pipe. This defective condition of threads upon pipe and cap, if it existed at all, must have existed at Galveston where the vessel lay only a few days before encountering the storm. *If a shipowner warrants his vessel to be 'tight, staunch, strong, and in every way fitted for the voyage,' his vessel must be so equipped as to withstand the buffeting of a forty mile gale.* The Edwin I. Morrison, supra, at p. 210;The Medea, supra, at pp. 787 to 792, and authorities therein cited. Under the circumstances the loss of the cap may not be attributed to the perils of the sea and the shipowner cannot avail itself of the exceptions to liability as set up in the bill of lading and the charter party."

II.
ARGUMENT.

(a) The Decision Rendered by the Circuit Court of Appeals for the Third Circuit Is Not in Conflict Either With the Decision of the Circuit Court of Appeals for the Fifth Circuit in The Point Chico, 122 Fed. (2d) 1, or With the Decision of This Court in Commercial Molasses Corp. v. New York T. B. Corp., 86 L. ed. Adv. Ops. 125.

The question presented to the Circuit Court of Appeals for the Third Circuit was whether the "Plow City" was seaworthy when she left Galveston; and whether a vessel is seaworthy is a question which depends for its answer upon the facts peculiar to the case.

In *The Point Chico,* 122 Fed. (2d) 1, the Circuit Court of Appeals for the Fifth Circuit held that the burden was on the ship-owner to show that the vessel was seaworthy at the commencement of her voyage, and, on the facts peculiar to the case before it, affirmed the conclusion of the District Court that (a) the vessel was seaworthy when she left her last loading port, and (b) that the damage to her cargo had been caused by fault or error in navigation or management for which the ship-owner was not responsible under the provisions of the Harter Act.

In the instant case, the Circuit Court of Appeals for the Third Circuit likewise held that the owner of the "Plow City" had the burden of proving that she was seaworthy when she left Galveston; and, on the facts peculiar to the case, reached the further conclusion that this burden had not been sustained, and that the respondent was therefore entitled to recover its full damages.

The petitioner's contention that the decision of the Circuit Court of Appeals for the Third Circuit is in conflict with the decision of the Circuit Court of Appeals for the Fifth Circuit, is therefore, we respectfully submit, utterly untenable.

The petitioner asserts that the "Plow City" was a private carrier; and that in holding that the burden rested upon the petitioner of proving that she was seaworthy, the Circuit Court of Appeals for the Third Circuit rendered a decision in conflict with the decision of this Court in *Commercial Molasses Corp. v. New York T. B. Corp.*, 86 L. ed. Adv. Ops. 125. But the finding made by the Circuit Court of Appeals, and to which the petitioner has taken no exception, was:—that the "Plow City" had undertaken to deliver the respondent's sulphur at Norfolk, Va., "in the same good order and condition in which it was received".

The "Plow City", therefore, by undertaking to deliver the respondent's shipment "in the same good order and condition in which it was received", assumed the obligation of a common carrier, and, as such, had the burden of proving that she was seaworthy when she began her voyage.

The Edwin I. Morrison, 153 U. S. 199, 38 L. ed. 688;

The Commercial Molasses Corp. v. New York T. B. Corp., supra.

But even assuming that the "Plow City" was a private carrier, and had not assumed the obligation of a common carrier, then, as bailee of the respondent's cargo, it was the petitioner's duty to come forward with the information available to it, and the Circuit Court of Appeals for the Third Circuit, as the trier of the facts, when the case was before it, *de novo,* on appeal, was free to assume

that the vessel was unseaworthy, if that was a rational inference from the proven facts, as this Court likewise held in *Commercial Molasses Corp. v. New York T. B. Corp., supra.* The petitioner sought to establish that the "Plow City" was seaworthy; but the uncontradicted evidence showed that, during the height of the storm which the vessel encountered after leaving Galveston, the wind velocity was Force Eight on the Beaufort Scale, i. e. from 34 to 40 miles per hour, and that, within a few days after leaving port, sea water entered and flooded the vessel's No. 1 cargo hold in such quantities as to put her down at the head. The rational inference inference from the proven facts, therefore, was that the vessel could not have been seaworthy when she left port, and that was the conclusion reached by the Circuit Court of Appeals for the Third Circuit, which held (Transcript of Record, page 162):—

> "A vessel which takes in such quantities of water as to put her down at the head a few days after leaving port can not be presumed to have been seaworthy when she left port. * * * If a ship-owner warrants his vessel to be tight, staunch, strong and in every way fitted for the voyage, his vessel must be equipped to withstand the buffeting of a forty-mile gale. The Edwin I. Morrison, supra, at page 210; the Medea, supra, at pp. 787 to 792, and authorities therein cited. Under the circumstances the loss of the cap may not be attributed to the perils of the sea and the shipowner can not avail itself of the exceptions to liability as set up in the bill of lading and the charter party".

In *The Edwin I. Morrison, supra,* this Court held, p. 211:—

> "Perils of the sea were excepted by the charter party, but the burden of proof was on the respondent to show that the vessel was in good condition and suitable for the voyage at its inception".

(b) In Reaching Its Conclusions, the Circuit Court of Appeals for the Third Circuit Did Not Depart From the Accepted and Usual Course of Judicial Proceedings.

The Circuit Court of Appeals for the Third Circuit held that the trial judge had not properly complied with Rule 46½ of the Admiralty Rules of this Court, and had improperly allowed the proceedings before him to be unduly protracted through delays, adjournments and postponements for which he was responsible; but it did not, for either of these reasons, reverse his findings and conclusions, and direct a judgment to be entered in favor of the respondent, as the petitioner alleges.

Rule 46½ of the Admiralty Rules of this Court requires "the Court of first instance", to find the facts specially and to state separately its conclusions of law thereon; and in the instant case, the Court of first instance filed an extended opinion wherein it set forth the facts as found by it, and its conclusions of law thereon, although, with respect to the specific findings of fact and conclusions of law requested by the petitioner, the trial Judge contented himself by stating that he affirmed them "insofar as they are not at variance with the findings and discussion of facts herein." The Circuit Court of Appeals for the Third Circuit likewise filed an extended opinion wherein it set forth its findings of fact and conclusions of law thereon.

The case, therefore, is in no way analogous to *Panama Mail Steamship Company v. Vargas,* 281 U. S. 670, 74 L. Ed. 1105, in which the District Court entered a decree awarding damages without delivering any opinion, or making any findings of fact.

(c) The Respondent Was Entitled to File, in Its Own Name, a Libel Against the "Plow City".

The respondent was insured, but did not receive from its underwriter, Fidelity-Phoenix Fire Insurance Company, payment of its loss within the terms of its policy:— it received from its underwriter a loan, which was repayable only to the extent of any net recovery which it might make from any third party, as particularly set forth in its receipt therefor, a copy of which appears in the Transcript of Record, page 130.

The agreement between the respondent and its underwriter was in all respects similar to the agreement with respect to which this Court, in *Luckenbach v. McCahan Sugar Refining Co.*, 248 U. S. 139, 63 L. ed. 170, said:—

> "Agreements of this nature have been a common practice in business for many years. * * * The carrier insists that the transaction, while in terms a loan, is in substance a payment of insurance; that to treat it as if it were a loan is to follow the letter of the agreement and to disregard the actual facts; and that to give it effect as a loan is to sanction fiction and subterfuge. But no good reason appears either for questioning its legality or for denying it effect. * * * Whether the transfer of money or other things shall operate as a payment is ordinarily a matter which is determined by the intention of the parties to the transaction."

In the Luckenbach case, therefore, this Court upheld the transaction between the underwriter and its assured, as a loan, in accordance with the intention of the parties as expressed in their agreement; and in the instant case, likewise, the agreement between the respondent and its underwriter clearly expressed the intention of the parties that

the money which was being paid by the underwriter was advanced by it, and was received by the respondent as, a loan.

The Luckenbach decision was rendered by this Court in 1918, and definitely resolved whatever doubt may theretofore have existed with regard to the legality and effect of what this Court recognized had been a common practice in business for many years; and in upholding and giving effect to the agreement between the respondent and its underwriter in the instant case, the Circuit Court of Appeals for the Third Circuit rendered a decision in accordance with the law as established by this Court.

Moreover, since the respondent's underwriter did not make an unconditional payment on its policy of the amount of its insurance, it could not have maintained an action in its own name against the "Plow City", in the exercise of what might otherwise have been its right of subrogation. In *Judd & Root v. N. Y. & T. S. S. Co.*, 128 Fed. 7, the insurance company had paid the plaintiffs the full amount of their loss, as a loan, and it was the defendant's contention that the insurance company was therefore the real party and plaintiff in interest. The Circuit Court of Appeals for the Third Circuit held:—

> "The doctrine of subrogation has no relation to the question to be here determined. It cannot be invoked until the insurance company, as the one secondarily liable, has absolutely and unconditionally paid in full the amount of the indemnity for the loss in question. It would have then, and only then, under this doctrine, a right to assert in its own favor the rights and remedies of the insured."

III.

REASONS WHY THE PETITION SHOULD BE DENIED.

The question presented, i. e., whether the "Plow City" was seaworthy, was one of simple fact, to be determined by the evidence, and did not involve the interpretation of any Federal statute, nor any matter of public interest or importance. The decision rendered by the Circuit Court of Appeals for the Third Circuit, moreover, was not in conflict with the decision of any Circuit Court of Appeals on the same matter; it did not decide any important question of general law in a way which can in any wise be said to have probably been untenable or in conflict with the weight of authority; it did not decide an important question of Federal law which has not been, but should be, settled by this Court; it did not decide a Federal question in a way which can in any wise be said to be in conflict with the applicable decisions of this Court; and it did not in any wise depart from the accepted and usual course of judicial proceedings, nor did it in any wise sanction such a departure by the lower Court, so as to call for an exercise by this Court of its power of supervision.

We therefore respectfully submit that the petition for a writ of certiorari should be denied.

Respectfully submitted,

Otto Wolff, Jr.,
Philadelphia, Pa.,
Attorney for Respondent.

JAN 9 1942
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1941.

No. 795.

PLOW CITY STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "PLOW CITY" (Respondent-Appellee in the Court Below),

Petitioner,

v.

TEXAS GULF SULPHUR COMPANY, INCORPORATED (Libellant-Appellant in the Court Below),

Respondent.

PETITIONER'S REPLY BRIEF.

GEORGE E. BEECHWOOD,
JAMES S. BENN, Jr.,
CONLEN, LaBRUM & BEECHWOOD,
1507 Packard Bldg.,
Philadelphia, Pa.,
Proctors for Petitioner.

International, 236 Chestnut St., Philadelphia

TABLE OF CASES IN REPLY BRIEF.

	Page
Commercial Molasses Corp. v. New York T. B. Corp. (1941) U. S. , 62 S. Ct. 156, 86 L. ed. Adv. Ops. 125	1, 3
The Edwin I. Morrison, (1894) 153 U. S. 189, 38 L. ed. 688, 14 S. Ct. 823	1, 3
Matton Oil Transfer Corp. v. Diesel Tug "Dynamic" (Unreported, except in 5 Fed. Rules Serv. 52a-11, Case 2)	3, 5

IN THE

Supreme Court of the United States.

No. 795. October Term, 1941.

PLOW CITY STEAMSHIP COMPANY, CLAIMANT OF THE STEAMSHIP "PLOW CITY" (RESPONDENT-APPELLEE IN THE COURT BELOW),

Petitioner,

v.

TEXAS GULF SULPHUR COMPANY, INCORPORATED (LIBELLANT-APPELLANT IN THE COURT BELOW),

Respondent.

PETITIONER'S REPLY BRIEF.

I.

Respondent argues that the decision of the Circuit Court of Appeals for the Third Circuit is not in conflict with the decision of this Court in *Commercial Molasses Corp. v. New York T. B. Corp.*, (1941) U. S. , 62 S. Ct. 156, 86 L. ed. Adv. Ops. 125, because, respondent contends, the "Plow City" assumed the obligation of a common carrier. This argument is based upon the fact that the so-called "bill of lading" (Libellant's Exhibit 1) contains the words "to be delivered in like good order and condition" and, according to respondent, the majority opinion in the Commercial Molasses case differentiated *The Edwin I. Morrison,* (1894) 153 U. S. 199, 38 L. ed. 688, 14 S. Ct. 823, on that same ground.

Respondent overlooks the fact that, as the majority opinion in the Commercial Molasses case is careful to point out, the undertaking of the master-owner of the "Edwin I. Morrison" to deliver in good order and condition was subject only to an exception of "dangers of the sea." In the present case, on the other hand, the "bill of lading" contained a great many exceptions, and could in no way be construed to be an assumption of an insurer's liability.

Respondent also makes no mention of the even more important fact that the "bill of lading" incorporated by reference all the terms and exceptions of a charter party dated March 26, 1937, between American Range Lines, Inc., operator of the "Plow City", and International Freighting Corporation, Inc., which had entered into a similar charter party with respondent. Neither of these charter parties contains any undertaking to deliver in good order and condition.

In the District Court respondent took the position that the "bill of lading" was a mere receipt. In the Circuit Court of Appeals respondent, while apparently not conceding that it was bound by any agreement to which it was not a signatory party, assumed for the purpose of the argument that the exemptions contained in the charter party of March 26, 1937, were incorporated in the "bill of lading" by reference. Now, it seems, respondent would have the "bill of lading" regarded as constituting its entire contract with the "Plow City" and petitioner.

It is clear from the opinions below that both the District Court and the Circuit Court of Appeals took the view that the "bill of lading" must be construed together with the charter party in order to ascertain the terms of the contract here in question. Moreover, it must be borne in mind that not only the "bill of lading" but the charter party

as well were respondent's own forms adapted to fit the particular circumstances of the entire transaction. Obviously the "bill of lading" was never a bill of lading at all in the sense that such a document normally constitutes the entire contract between the shipper and the ship and shipowner. It follows, therefore, that there never was in this case any assumption of the obligation of a common carrier by reason of any of the provisions of the so-called "bill of lading."

It is submitted that the distinction which this Court drew in its decision in *Commercial Molasses Corp. v. New York T. B. Corp., supra,* between that case and the case of *The Edwin I. Morrison, supra,* does not exist between the Commercial Molasses case and the present case, and that certiorari should be granted to resolve the conflict between the decision of the Circuit Court of Appeals and this Court's said decision.

II.

On December 1, 1941, the Circuit Court of Appeals for the second Circuit handed down its decision in *Matton Oil Transfer Corp. v. Diesel Tug "Dynamic".* The case is as yet unreported except in 5 Fed. Rules Serv. 52a.11, Case 2, and it came to the attention of counsel for petitioner too late to be referred to in the brief in support of the petition for a writ of certiorari, which was filed on December 11, 1941.

In that case no findings of fact or conclusions of law were made by the District Court, and there was only a brief statement by the District Judge at the conclusion of the trial setting forth his determination as to the liabilities. The decree subsequently entered referred to this brief statement as an "oral opinion." An appeal followed.

In a per curiam opinion the Circuit Court of Appeals for the Second Circuit stated:

> "As we have regularly held, the substance of the admiralty rule requires, as in ordinary civil actions, that we should give due weight to the findings of fact made by the trial judge, who has had the opportunity to see the witnesses as they testified and thus determine the truth of disputed testimony in ways not open merely on inspection of a printed appellate record. Hence we have often decided that admiralty findings, like civil findings generally, should not be set aside unless clearly erroneous. Commercial Molasses Corp. v. New York Tank Barge Corp., 114 F. (2d) 248, 250, *aff'd* S. Ct. , Nov. 17, 1941; *The Aakre*, 122 F. (2d) 469, 474, and cases cited. Consequently we do not feel that we can properly dispose of this case without the help which observance of the rule would afford us. Moreover, the insistence of the Supreme Court upon appropriate findings should not be disregarded. Mayo v. Lakeland Highlands Canning Co., 309 U. S. 310, 316, and cases cited; Interstate Circuit, Inc. v. United States, 304 U. S. 55; *cf.* Smith v. Lykes Brothers-Ripley S.S. Co., 105 F. (2d) 604, (C. C. A. 5th), *cert. den.* 308 U. S. 604; *The Plow City*, 122 F. (2d) 816, 819 (C. C. A. 3d)."

The Circuit Court of Appeals reversed the decree of the District Court and remanded the cause "with directions to the district court to state its findings of fact and conclusions of law as required by Admiralty Rule 46½." In the present case the Circuit Court of Appeals reversed the decree of the District Court and remanded the cause "with directions to ascertain the damages sustained by the libellant and to enter final judgment for the libellant in such sum, with costs to the libellant."

It is submitted that the procedure directed by the Circuit Court of Appeals for the Second Circuit in the case of *Matton Oil Transfer Corp. v. Diesel Tug "Dynamic"*, *supra*, is the procedure which should have been directed in the present case, assuming that the District Court for the Eastern District of Pennsylvania did not sufficiently comply with Admiralty Rule 46½. It is further submitted, therefore, that certiorari should be granted because the Circuit Court of Appeals for the Third Circuit has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

III.

It is submitted that certiorari should be granted to reverse the decision of the United States Circuit Court of Appeals for the Third Circuit.

Respectfully submitted,

GEORGE E. BEECHWOOD,
JAMES S. BENN, JR.,
CONLEN, LABRUM & BEECHWOOD,
Proctors for Petitioner.